No. 2798

# United States

# Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

T. F. Turner,
*Appellant.*

*vs.*

Kate J. Wells, et al.,
*Appellees.*

## PETITION FOR REHEARING.


WM. B. OGDEN,
RALPH E. ESTEB,
*Solicitors for Complainant-Appellant.*



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## PETITION FOR REHEARING.

*To the Honorable Judges of the United States Circuit Court:*

The undersigned, Wm. B. Ogden and Ralph E. Esteb, solicitors for complainant and appellant, T. Frank Turner, showeth unto Your Honors that, feeling himself aggrieved by the opinion and decision of Your Honors entered in this cause on the 8th day of January, 1917, respectfully ask that the opinion and decision filed herein be set aside and a rehearing granted herein, upon the grounds and for the reasons hereinafter set forth, humbly submitting to such orders as the court may make, if this application should be found to be without merit:

I.

Upon the ground that Your Honors, inadvertently, and being misled by the decision of the lower court incorporated in the record, in rendering your decision, considered the effect of evidence not introduced or given at the trial of the suit in the court below, the same being evidence which was before the lower court only upon a petition for rehearing based upon newly discovered evidence, and not a part of the record on appeal, nor considered by the lower court at the trial or in making its decree on the merits. The evidence referred to is the letter from Wells to Wilson, strongly relied upon by this court to show that Wells furnished Burgess Robinson his (Wells') own money for his (Robinson's) expenses while locating the claims, and to show an inconsistency between that letter and the statement of Wells to Turner and Creel in his letter to them and to detract from the weight to be given to his testimony therein contained. But it is to be remembered that even on the date of that letter, which was a letter addressed to an attorney whom he hoped would undertake a retainer from him, *that he was still prosecuting his plan to defraud Turner and Creel* and to recover for himself the interest which he had secretly buried beneath the name of his wife. But it, even, is not inconsistent with the contention of the appellant, for, to all intents and purposes, the money paid by Turner and Creel became and was "his (Wells') own money," for the purpose of acquiring these or any locations, in the interest of the partnership.

If the court desires to consider the evidence contained in the Wilson letter as part of the evidence in this case, then we respectfully submit that it should order up the entire record on the rehearing, for the purpose of considering the whole of the evidence, as it is manifestly unfair to the appellant to consider a part of it, without considering the whole, and especially only parts selected by the *nisi prius* judge in giving his reasons for refusing to grant the rehearing. This appeal was not taken upon the ground of the refusal of the lower court to grant a rehearing, and no assignment of error is made therefor, and the evidence presented in the application for a rehearing is not set forth in the record and has no place in this appeal and especially should it not be considered on this appeal when it was never entertained by the lower court as a part of the case when on trial. If, however, the court feels warranted in considering any part of this newly discovered evidence set forth in the *nisi prius* application for rehearing, it should order all of the evidence set forth in that application sent up so that it may have before it and give due consideration to all of that evidence, and not to garbled parts thereof.

II.

Upon the ground and for the reason that the statement in the opinion, that Mrs. Wells furnished an outfit for Burgess Robinson "to go into the district" is inconsistent with the first well-established point as declared by this court, namely: That Wells took Burgess

Robinson with him under the Turner-Creel grub-stake from Rhyolite, Nevada, to the place where the claims were located; that he went to the district from Rhyolite at the expense of and under the contract with Turner and Creel is well established by the testimony of a disinterested witness, Mrs. Della Miles, as to statements made by Mrs. Wells in the spring of 1907 [Trans. p. 57]. Mrs. Wells in her own testimony only claimed that she furnished Robinson with supplies after he arrived in the district, and it is not inconsistent, we think, to assume, under the circumstance, that the rich discoveries were the inducement for the pretended changing of the source of supplies after arrival.

That Wells for a long time had been incapacitated for work by rheumatism, was without money, and lived on the charity of Turner and Creel, contributing nothing to his keep or the outfit, is also beyond question. That Burgess Robinson also lived for a period with Turner and Creel and contributed nothing to his keep or the outfit, is also beyond controversy. These facts, in themselves immaterial, perhaps, go to corroborate Wells' written statement, and absolutely disprove that Mrs. Wells outfitted Burgess Robinson.

III.

Upon the ground and for the reason that it is held in the opinion that Burgess Robinson was acting in a "dual capacity," which, under the facts in this case, is an impossibility, as he could not comply with the terms of his agreement to act with Wells and at the same time act for Mrs. Wells in the same capacity and

deprive appellant of the benefits thereof, neither could Wells become the assistant of Robinson and deprive appellant of his right to have Robinson assist him and by this juggling of words do that which honest men and courts declare to be a breach of trust. As was so aptly said by Mr. Justice Field, in *Kimberly v. Arms* (129 U. S. 506; 32 L. Ed. 770):

> "Neither by open fraud nor concealed deception, nor by any contrivance masking his actual relations to the firm, can a member of it, or an agent of it, be permitted to hold to his own use acquisitions made in disregard to those relations, either as partner or agent. In this statement of their duties we are repeating doctrines of common knowledge which will be found fully set forth and illustrated in approved treatises on partnerships and agency and in the adjudications of the courts."

## IV.

Upon the ground and for the reason that it is in effect held in the opinion that because Burgess Robinson actually posted the notices and that the notices contained his name and that of another, that this could not be a location by Wells, notwithstanding their agreement to locate these claims jointly for Turner and Creel. If this were true, if by merely permitting another to actually put up a location notice in his own name, made the latter a locator instead of the former, then an easy road is open by which any trusted agent may deprive his principal of the fruits of the agent's

labor and the principal's capital. We think a long line of decisions in this country establish the point that just such a state of facts will create the wrongdoer, and the recipient of the benefits of the wrong, trustees for the defrauded principal.

V.

Upon the ground and for the reason that in explanation of its position the court says that there can be no question that Burgess was free, so far as any obligation to Turner and Creel was concerned, to make locations, in his own, and his mother's name, and that it is not inconsistent with the record to infer that all the claims in controversy were located by Burgess. Appellant deems that in arriving at this conclusion the court must have failed to consider the fact that all the location certificates were admittedly written, signed and witnessed by Wells and afterwards recorded by him, and it is not inconsistent with the record to assume that he paid for the recording out of money given him by Turner and Creel for the purposes of the grub-stake contract.

The decision then states that the letter was written under a wrongful impression that all claims located by Wells or Burgess would be the property of Turner, Creel and Wells. We believe this to be error, and that the law, rightly applied, would sustain the belief of Wells in that regard.

The decision further proceeds to say that his statement that "we discovered and located" the claims is

not inconsistent with the theory that he assisted Burgess to locate, but if he did so, then they both violated the contract with Turner and Creel, with whom they had agreed that Burgess was to assist Wells, and for this purpose Turner and Creel furnished provisions and money for both of them, with which they admittedly journeyed from Rhyolite to the district where the claims are located. Until Burgess or some one for him had recompensed Turner and Creel for this outlay he was in duty bound to carry out the contract made by him. These are points which, upon the face of the opinion, we submit are contrary to law, but we must not overlook the fact that, according to statement of Wells, which is admitted by the court to be competent, there actually existed a conspiracy between Wells, Burgess and Mrs. Wells as stated in the letter, and that this statement was corroborated by all the surrounding circumstances and the testimony.

VI.

Upon the ground and for the reason that, if we admit, for the sake of argument, appellant failed to connect Mrs. Wells with the conspiracy, or knowledge of the fraud practiced upon us by Wells and Burgess Robinson, yet it remains undisputed that Burgess Robinson had full knowledge of the contract, was a party to it, accepted the benefits coming from Turner and Creel to he and Wells, and *his* interest, at least, is subject to the contract and the trust thereby created. Kate J. Wells succeeded by inheritance to a one-half

interest in the claims, the whole of which interest at least should now be declared subject to the trust. That he knew his guilt is evidenced by his remark to Della Miles, appearing on page 58 of the printed transcript, in which she related:

"This conversation was along, I should say, the first of September, * * * there had been some trouble down to the camp, and Burgess came up and said that he was going to get out of there, that Wells and his mother was raising so much fuss that Creel and Turner would come in and take the whole thing anyhow as soon as they heard about it."

No stronger testimony in proof of a guilty conscience could be elicited before any court. It is true that this testimony was stricken out upon motion of counsel "as not responsive to the question." The question was, "You may state what that conversation with Burgess T. Robinson was." A mere statement of the question, answer and motion discloses the error of the lower court in granting the motion, assigned as fifth assignment of error, and as said by a learned judge upon one occasion, if the statement of the facts in relation to this assignment of error would not convince one of the error complained of, no argument of ours would bring about conviction. If upon the presentation of this appeal to the court, we did not specifically urge this assignment of error, it was for the reason that the error complained of was so apparent to appellant that no argument was

deemed necessary, and if by reason of our laxity in this regard this Honorable Court has inadvertently overlooked this glaring error, we suggest that a rehearing should be granted for this, if no other, reason.

Accordingly it is respectfully submitted that the case should be reopened and be given further consideration by the court.

Dated Los Angeles, California, January 25, 1917.

Wm. B. Ogden,
Ralph E. Esteb,
*Solicitors for Complainant-Appellant.*

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## CERTIFICATE OF SOLICITORS.

We, William B. Ogden and Ralph E. Esteb, solicitors for complainant, appellant herein, do hereby certify that we jointly prepared the foregoing petition for a rehearing, and that in our judgment the same is well founded and should be granted; and we further certify that it is not interposed for delay, but to the end that substantial justice may be done, and your solicitors further certify that one of the reasons why this petition is not filed for delay is that the defendant, Kate J. Wells, since the commencement of this cause of action, has been and now is in peaceable and profitable possession of all of the mining claims which are the subject of controversy herein, and that no injunction or other restraining order of any kind has been issued against her in relation to the use or occu-

pation of the same, so that any delay in the transmission of the remittitur or mandate of this court to the lower court could in no wise hinder or delay the defendant, Kate J. Wells, or interrupt the continuity of her peaceful and profitable occupation of the premises which are the subject of this litigation.

In witness whereof, we have hereunto set our hand and seal this 25 day of January, 1917.

WM. B. OGDEN,
RALPH E. ESTEB,
*Solicitors for Complainant-Appellant T. Frank Turner.*